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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BARBARA A. DE BUONO, M.D., New York State Commissioner of Health, *et al.*,
Petitioners,

v.

NYSA-ILA MEDICAL AND CLINICAL SERVICES FUND, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether ERISA preempts New York State's gross receipts tax on health care providers.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling in-

terest in legal issues that affect state and local governments. The States, in a cooperative partnership with the Federal government, administer the Medicaid program to provide health care to the most needy and vulnerable. Providing this care, however, is extremely costly.

Although Medicaid is jointly funded by the States and the Federal government, according to HHS "[t]he State share of these expenditures now represents one of the largest and fastest growing components of most States' budgets." U.S. Department of Health and Human Services, Health Care Financing Administration, *Health Care Financing Review: Medicare and Medicaid Statistical Supplement, 1996* 138 (1996). Indeed, between fiscal years 1990 and 1994, the States' Medicaid expenditures nearly doubled from $31.6 to $60.6 billion dollars. *Id.* at 400 (Table 109). Medicaid expenditures are the States' second largest spending category, having "grown from just over 10 percent of state spending in 1987 to 19.2 percent in 1995." National Association of State Budget Officers, *1995 State Expenditure Report*, Executive Summary at 3-4 (1996).

In response to the fiscal burden imposed by the rapid growth in Medicaid expenditures, New York and many other States adopted taxes on health care providers. These taxes, which are authorized by federal statute, *see* 42 U.S.C. § 1396b(w), provide a critical source of revenue to the States. An affirmance of the court of appeals' holding would not only deny States needed revenues whenever a provider is operated by an ERISA plan, it could also call into question the States' authority to collect provider taxes from self-insured ERISA plans that pay their beneficiaries' medical bills directly. *Cf. Boyle v. Anderson*, 68 F.3d 1093 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1266 (1996). The latter is potentially a momentous concern for the States as "65 percent of the U.S. businesses that offer health benefits—and virtually all large corporations—are now self-insured." Nina Martin, "ERISA: The Law That Ate Health Care Reform," 13 California Lawyer 40, 43 (May 1993).

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.[1]

STATEMENT

A. The Role Of State Health Care Provider Taxes

This case involves a challenge to New York's Health Facility Assessment, which is a six-tenths of one percent tax on the gross receipts of hospitals and other health care facilities providing diagnostic and treatment services under the supervision of a physician or dentist. N.Y. Pub. Health Law §§ 2801(1); 2807-d. New York enacted the tax to pay for the State's increasing health care costs and to avoid reductions in its funding under the Medicaid program.[2]

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

[2] New York's concerns are not unique. According to the Health Care Financing Administration, in 1994 state and local governments spent $117.2 billion on health care or 13.8 percent of their total budgets. U.S. Department of Health and Human Services, National Center for Health Statistics, *Health, United States, 1995* 239 (1996) (Table 114).

Medicaid spending comprises a substantial portion of state health care spending and state budgets. In fiscal year 1994, the States spent $60.6 billion on Medicaid. *Medicare and Medicaid Statistical Supplement, 1996*, at 400. This figure

New York is not alone in taxing health care providers. Federal law expressly authorizes the States to treat the revenues raised through such taxes as expenditures in obtaining Medicaid matching funds, *see* 42 U.S.C. § 1396b(w), and at least 18 States impose taxes similar to New York's HFA. These taxes provide a substantial portion of the States' share of the Medicaid program's cost, *see, e.g.*, Vt. Stat. Ann. tit. 33, § 1956(b); W.Va. Code § 11-27-32, raising approximately four billion dollars annually. In some States, provider taxes are also used to fund uncompensated care. *See, e.g.*, N.H. Rev. Stat. Ann. § 84-A:5; Mass. Ann. Laws ch. 118G, § 18. And Minnesota's health care provider tax is an integral component of the State's effort to expand health care coverage for uninsured persons who are not eligible for Medicaid. *See* Minn. Stat. Ann. §§ 295.58, 295.581; United States General Accounting Office, *Access To Health Care: States Respond to Growing Crisis* 47 (U.S. GAO/HRD-92-70); *Boyle v. Anderson*, 68 F.3d at 1097-98.

B. The Court Of Appeals' Decisions

In its initial decision, the court of appeals held that ERISA preempts New York's HFA. It rejected the State's argument that the tax is a "law of general application that affects ERISA plans only incidentally" and which "is no more directed at ERISA plans" than numerous other taxes and regulations. Pet. App. 11a. According to the court, New York's tax "relates to" an ERISA plan and is thus expressly

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represents nearly a doubling of state Medicaid expenditures from the fiscal year 1990 level of $31.6 billion. *Id.*

preempted by ERISA Section 514(a), 29 U.S.C. § 1144(a), because it

> depletes those assets earmarked for the provision of health care benefits and, as a result, will cause the Fund to reduce benefits provided and/or to charge beneficiaries more in the future for benefits received. Both impacts will detrimentally affect the central mission and purpose of the Fund and hence cannot be characterized as remote or tenuous.

Pet. App. 12a.

In reconsidering its decision in light of *Travelers*,[3] the court of appeals concluded that *Travelers* was distinguishable and provided no ground upon which to disturb its earlier decision. Pet. App. 3a. According to the court of appeals, "[t]he statute at issue in *Travelers* did not impose surcharges on ERISA plans themselves, but on insurance carriers providing health insurance coverage to the plans and their beneficiaries." *Id.* It was thus distinguishable "because, unlike in *Travelers*, there is no third party between the plan and the tax imposed pursuant to the HFA. Rather, the statute at issue depletes the Fund's assets directly, and thus has an immediate impact on the operations of an ERISA plan." *Id.* at 3a-4a. Reasoning that "[n]othing in *Travelers* undermines our reliance on the HFA's direct economic impact upon the Fund as a basis for finding ERISA pre-emption nor precludes a determination that a state law's direct economic impact on ERISA plans is sufficient for a finding of pre-emption," the court adhered to its original holding that ERISA expressly preempts the HFA. *Id.* at 4a.

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[3] *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 115 S.Ct. 1671 (1995).

SUMMARY OF ARGUMENT

1. New York's HFA is a classic exercise of the States' power to regulate the provision of health care and is not preempted by ERISA. It is a generally applicable tax that does not single out ERISA plans for discriminatory treatment. As such, it no more "relates to" ERISA plans than the generally applicable surcharges on hospital rates upheld by this Court in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 115 S.Ct. 1671 (1995).

In *Travelers* the Court held that in determining the scope of ERISA preemption, it is necessary to "go beyond the unhelpful text" of ERISA Section 514(a) and "look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." 115 S.Ct. at 1677. This inquiry "'must be guided by respect for the separate spheres of governmental authority preserved in our federalist system.'" *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 19 (1987) (citation omitted). And in ERISA preemption analysis, as in preemption analysis generally, the Court must "work[] on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Travelers*, 115 S.Ct. at 1676 (citation omitted).

The Court explained in *Travelers* that Congress enacted Section 514(a) "'to ensure that plans and plan sponsors would be subject to a uniform body of benefits law,'" *id.* at 1677 (citation omitted), and "to avoid a multiplicity of regulation in order to permit the nationally uniform administration of em-

ployee benefit plans." *Id.* at 1677-78. Consequently, the Court has repeatedly held that ERISA preempts "state laws that mandate[] employee benefit structures or their administration." *Id.* at 1678.

New York's gross receipts tax on providers does no such thing. It does not single out ERISA plans for different treatment but instead applies to all medical facilities providing care under the supervision of a physician or dentist. It does not require plans to provide a benefit in New York which differs from the benefits which the plan provides to beneficiaries residing in other States. Nor does it burden plan administrators by requiring them to calculate benefit levels which differ from State to State. Because the HFA plainly does not interfere with any of the purposes which Congress sought to achieve in enacting ERISA, it is not preempted.

2. The court of appeals nonetheless held the HFA to be preempted because of its economic impact on ERISA plans. But as the Court explained in *Travelers*, if this were the test for ERISA preemption any state law that increases plan costs would be preempted. And "nothing in the language of [ERISA] or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern." 115 S.Ct. at 1680.

On remand, the court of appeals sought to distinguish *Travelers* because the surcharges at issue in that case were imposed on insurance carriers and not directly on ERISA plans themselves. This reasoning ignores that the HFA's "connection" to an ERISA plan arises solely because the plan has chosen to provide medical care, a traditional area of state reg-

ulation and an activity engaged in by a wide range of entities. There is no more reason to think that ERISA preempts the HFA than that it preempts state licensing of medical practitioners or state laws that regulate the disposal of medical waste.

Moreover, the substantial surcharges at issue in *Travelers* had a far greater impact on the plans' ability to provide benefits to their members than the HFA, yet the Court did not hesitate to find that the surcharges were not preempted. *Travelers* unequivocally establishes that in enacting ERISA, Congress was not concerned with shielding ERISA plans from generally applicable state laws simply because those laws raise plans' costs.

ARGUMENT

ERISA DOES NOT PREEMPT NEW YORK'S GROSS RECEIPTS TAX ON HEALTH CARE PROVIDERS

The court of appeals erred in holding that ERISA preempts New York's Health Facility Assessment. The HFA is far removed from the concerns for the uniform administration of pension and welfare benefit plans which prompted Congress to enact ERISA. The HFA does not single out ERISA plans for discriminatory treatment. Rather, it is a generally applicable tax which no more "relates to" an ERISA plan than the generally applicable surcharges on medical bills upheld in *Travelers*. As such the HFA has "'only a tenuous, remote, or peripheral connection with covered plans,'" and is thus not preempted. *Travelers*, 115 S.Ct. at 1680 (quoting *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 130 n.1 (1992)).

The court of appeals' holding inverts the traditional presumption against preemption of the States'

historic police powers and would provide ERISA plans with a wide ranging immunity from generally applicable state regulation, a result far removed from the concerns which prompted the enactment of ERISA. ERISA Section 514(a) does not condition preemption on whether a state law has a direct or indirect economic impact on a plan. *See Greater Washington Board of Trade*, 506 U.S. at 130 (citing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990)). The Court should therefore reverse the judgment below.

A. In Enacting Section 514(a), Congress Did Not Intend To Preempt State Gross Receipts Taxes On Health Care Providers

ERISA Section 514(a) expressly preempts "all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). While the Court has explained that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan," *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983), it has recently stated that Section 514(a)'s "expansive" text is not to be given a literal reading: "If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere.'" *Travelers*, 115 S.Ct. at 1677 (quoting H. James, *Roderick Hudson* xli (New York ed., World's Classics 1980)). In a similar vein, the Court has explained that to say that "'[a] law "relates to" an employee benefit plan . . . if it has a connection with or reference to such a plan'" is of "no more help than . . . trying to construe 'relate to.'" *Id.* at 1677 (quoting *Shaw*, 463 U.S. at 96-97).

The Court has thus recognized that in determining whether ERISA preempts state law, it "must go beyond the unhelpful text [of Section 514(a)] and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* This inquiry, which the court of appeals did not conduct either in its initial decision or in its post-*Travelers* reconsideration, must, of course, " 'be guided by respect for the separate spheres of governmental authority preserved in our federalist system.' " *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 19 (1987) (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981)).

This case involves a classic exercise of the States' traditional police powers. *See Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 719 (1985) ("the regulation of health and safety matters is primarily, and historically, a matter of local concern") (citation omitted). In this case, as in every preemption case, the Court "work[s] on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Travelers*, 115 S.Ct. at 1676 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This inquiry inescapably leads to the conclusion that ERISA does not preempt New York's generally applicable Health Facility Assessment.

As the Court has observed, Congress enacted Section 514(a) intending

> "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government . . . , [and to prevent] the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction."

Travelers, 115 S.Ct. 1677 (quoting *Ingersoll-Rand*, 498 U.S. at 142). The Court has further explained that "[t]he basic thrust of the pre-emption clause . . . was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Id.* at 1677-78.

The Court has thus held that a New York law mandating that a plan provide certain benefits was preempted. *See Shaw*, 463 U.S. at 97. As the Court subsequently explained the *Shaw* decision, state

> mandates affecting coverage could have been honored only by varying the subjects of a plan's benefits whenever New York law might have applied, or by requiring every plan to provide all beneficiaries with a benefit demanded by New York law if New York law could have been said to require it for any one beneficiary.

Travelers, 115 S.Ct. at 1678.

The Court similarly held that ERISA preempted a Pennsylvania law prohibiting a plan from requiring a beneficiary to reimburse it in the event of recovery on a tort claim from a third party. *See FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990). The effect of the statute was to require plan administrators "to calculate benefit levels in Pennsylvania based on expected liability conditions that differ from those in States"

without similar antisubrogation legislation, thus "frustrat[ing] plan administrators' continuing obligation to calculate uniform benefit levels nationwide." *Id.* Those Pennsylvania employees who won damages in tort actions "would, by virtue of the state law, in effect have been entitled to benefits in excess of what plan administrators intended to provide, and in excess of what the plan provided to employees in other States." *Travelers*, 115 S.Ct. at 1678.[4]

As the Court has explained, "[i]n each of these cases, ERISA pre-empted state laws that mandated employee benefit structures or their administration." *Id.* In each instance, the state laws would have resulted in plan administrators having to provide differing benefit levels depending upon a beneficiary's State. The state laws also interfered with the benefit levels agreed to by employers and employees through the collective bargaining process.

New York's tax on the gross receipts of health care providers raises no similar concerns. The tax does not single out ERISA plans for different treatment

[4] On similar reasoning the Court held that ERISA pre-empted a provision of New Jersey's Workers' Compensation Act which prohibited pension plans from offsetting an employee's retirement benefits by the amount of any workers' compensation award received by a retired worker. *Alessi*, 451 U.S. at 524-26. The state statute was deemed preempted because ERISA permitted pension plans to "integrat[e] . . . pension funds with other public income maintenance moneys for the purpose of calculating benefits" and the IRS has "approve[d] integration with the exact funds addressed by the New Jersey workers' compensation law." *Id.* at 524. Moreover, ERISA left the matter, "along with other pension calculation techniques, subject to the discretion of pension plan designers," *i.e.*, to the collective bargaining process. *Id.* at 525. The state statute thus intruded on the federal scheme.

but applies to all medical facilities providing care under the supervision of a physician or dentist; it is not dependent on the ownership status of the facility or on the source of payment for patient care. *See* N.Y. Pub. Health Law § 2801(1). The tax thus "makes no reference to, [and] indeed functions irrespectve of, the existence of an ERISA plan." *Ingersoll-Rand*, 498 U.S. at 139.

Most significantly, the tax does not require plans to provide a benefit in New York which differs from the benefits which the plan provides to beneficiaries residing in other States. *See Shaw*, 463 U.S. at 97. Nor does it burden plan administrators by requiring them to calculate benefit levels which differ from State to State. *See FMC Corp.*, 498 U.S. at 59-60. The tax simply does not interfere with any of the purposes which Congress sought to achieve in enacting ERISA. In short, the tax is a generally applicable statute which has " 'only a tenuous, remote, or peripheral connection with covered plans,' " and thus is not preempted. *Travelers*, 115 S.Ct. at 1680 (quoting *Greater Washington Bd. of Trade*, 506 U.S. at 130 n.1).

The court of appeals nonetheless held that the tax was preempted because it "depletes those assets earmarked for the provision of health care benefits and, as a result, will cause the Fund to reduce benefits provided and/or to charge beneficiaries more in the future for benefits received." Pet. App. 12a. According to the court, "[b]oth impacts will detrimentally affect the central mission and purpose of the Fund and hence cannot be characterized as remote or tenuous." *Id.*

This view of the scope of ERISA preemption is so broad that it would require courts to hold preempted

virtually every generally applicable state law that increases the costs of an ERISA plan. It turns on its head the traditional presumption against preemption of the States' historic police powers, *see Travelers*, 115 S.Ct. at 1676, and ignores this Court's admonition that in construing Section 514(a), courts " 'must be guided by respect for the separate spheres of governmental authority preserved in our federalist system.' " *Fort Halifax Packing*, 482 U.S. at 19 (quoting *Alessi*, 451 U.S. at 522).

Indeed, taken to its logical conclusion the court of appeals' holding would mandate the preemption of state laws requiring the licensing of physicians and nurses, regulating the disposal of medical waste, and setting the staffing levels and working conditions of medical support personnel, because such regulations undoubtedly increase the Fund's costs and thus either require it to reduce benefit levels or charge beneficiaries more.[5] But as the Court observed in *Travelers*, "nothing in the language of [ERISA] or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern." 115 S.Ct. at 1680.

B. *Travelers* Is Not Distinguishable From This Case

On reconsideration, the court of appeals distinguished *Travelers* on the grounds that the surcharges on hospital bills paid by commercial insurers and

[5] Under the logic of the court of appeals, even a state minimum wage law would be preempted because to the extent it required the plan to pay its employees higher wages, it would deplete the plan's assets and "cause the [plan] to reduce benefits provided and/or to charge beneficiaries more in the future for benefits received." Pet. App. 12a.

health maintenance organizations which were upheld therein were not imposed "on ERISA plans themselves, but on insurance carriers providing health insurance coverage to the plans and their beneficiaries." Pet. App. 3a. According to the court of appeals, "the present case [is] distinguish[able] . . . from *Travelers*, because, unlike in *Travelers*, there is no third party between the plan and the tax imposed pursuant to the HFA. Rather, the statute at issue depletes the Fund's assets directly, and thus has an immediate impact on the operations of an ERISA plan." *Id.* at 3a-4a. The court further asserted that "[n]othing in *Travelers* undermines our reliance on the HFA's direct economic impact upon the Fund as a basis for finding ERISA pre-emption nor precludes a determination that a state law's direct economic impact on ERISA plans is sufficient for a finding of pre-emption." *Id.* at 4a.

The court of appeals' attempt to distinguish *Travelers* is unpersuasive. It ignores that the HFA's "connection" to the plan arises because the plan has chosen to engage in the provision of medical care, an activity which is a traditional concern of state regulation. It is no more credible to assert that ERISA preempts the State's authority to impose this tax than it is to argue that ERISA preempts the State's regulations regarding the licensing of the facility's physicians and the disposal of medical waste. Certainly, state laws requiring that the plan's medical personnel be licensed and mandating the method of medical waste disposal also "directly" impose increased costs on the plan but just as surely such laws are not preempted. The HFA, like the State's other regulations applicable to health care facilities, simply has too " 'tenuous, remote, or peripheral [a] connection with covered

plans' " to be within the ambit of ERISA preemption. *Travelers*, 115 S.Ct. at 1680 (quoting *Greater Washington Bd. of Trade*, 506 U.S. at 130 n.1).

It is thus not persuasive to distinguish *Travelers* on the ground that the surcharges upheld therein were indirect whereas the HFA is direct. *See* Pet. App. 3a-4a. Whatever the precise boundaries of ERISA preemption, it is clear that preemption is not dependent upon whether a state law has a direct or indirect impact on an ERISA plan, but rather on the substantive nature of the impact on the plan. *See, e.g., Travelers*, 115 S.Ct. at 1683; *Ingersoll-Rand*, 498 U.S. at 139. Indeed, it is quite illogical to condition preemption on such a distinction. The indirect surcharges upheld in *Travelers* are, after all, far more likely to reduce a plan's assets and its ability to provide benefit levels than the "direct" gross receipts tax of six tenths of one percent which New York has imposed here.

Travelers amply demonstrates that in enacting ERISA, Congress was not concerned with shielding ERISA plans from generally applicable state laws simply because they raise the plans' costs. And it is plainly not persuasive to suggest that a gross receipts tax of six-tenths of one percent has such an "acute" effect "as to force an ERISA plan to adopt a certain scheme of substantive coverage," thereby triggering preemption. *Travelers*, 115 S.Ct. at 1683; *see also Boyle v. Anderson*, 68 F.3d 1093, 1101-10 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 1266 (1996) (rejecting ERISA challenge by self-insured ERISA plans to two percent provider tax). Because the HFA works no interference with Congress' purposes in enacting ERISA, the court of appeals erred in holding that it is preempted.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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